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No. 10-97

In the Supreme Court of the United States

PATRICK J. LYNCH, and the PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

v.

THE CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, and POLICE COMMISSIONER RAYMOND W. KELLY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for The Second Circuit

REPLY BRIEF FOR PETITIONERS

MICHAEL T. MURRAY
Michael T. Murray & Assocs., P.C.
10 Esquire Rd., Ste. 10
New City, NY 10956
(845) 634-0031

THOMAS P. PUCCIO
Law Offices of Thomas P. Puccio
230 Park Ave. Ste. 301
New York City, NY 10169
(212) 883-6383

ANDREW L. FREY
Counsel of Record
EILEEN PENNER
Mayer Brown LLP
1999 K St. NW
Washington, DC 20006
(202) 263-3291
afrey@mayerbrown.com

Counsel for Petitioners

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REPLY BRIEF FOR PETITIONERS

The question presented is whether the Fourth Amendment allows police investigators—without any ground for suspicion—to subject officers to breath-testing following a shooting, in part for the purpose of investigating the officers' potential criminal liability and obtaining evidence for possible criminal prosecutions. The court of appeals held that the "special needs" doctrine allows police investigators to conduct such suspicionless, nonconsensual body searches so long as the criminal investigative purpose is not the "primary" one. See Pet. App. 12a-13a. That decision cannot be reconciled with this Court's "essential point" in *Ferguson v. City of Charleston* that "extensive entanglement of law enforcement" in suspicionless substance testing, such as "[t]he fact that positive test results [are] turned over to the police," "cannot be justified by reference to [special] needs." 532 U.S. 67, 83-84 & n.20 (2001). As the Court emphasized, "[i]n other special needs cases" it had "tolerated suspension of the Fourth Amendment's warrant or probable-cause requirement in part because there was ***no law enforcement purpose*** behind the searches * * *, and there was ***little, if any, entanglement with law enforcement***." *Id.* at 79 n.15 (emphases added).

1. In stark contrast, respondents readily agree that the suspicionless search program at issue here, "IO-52," has ***both*** a "law enforcement purpose" ***and*** significant "entanglement with law enforcement." Specifically, they expressly concede that "one purpose of IO 52 is related to crime control" (Opp. 24); and dismissively acknowledge that "[w]e can all agree" that law enforcement is "entangled" in their program of suspicionless searches (Opp. 26).

Strangely, respondents attempt to brush off this conceded "entanglement of law enforcement" in supposedly "administrative" civil searches, and their collection of test results for possible use for "criminal prosecution[s]" (Opp. 9), as a "red herring" (Opp. 26). They reason that these features of their drug-testing program are inevitable and unremarkable given the NYPD's dual roles as employer and law enforcement agency. Opp. 26-27.

But there is nothing inevitable or unremarkable about them. Other drug testing programs for law-enforcement employees—and indeed all of respondents' own prior drug and alcohol testing programs—have managed to avoid such entanglement and purpose by either (1) requiring individualized grounds for suspicion or consent as a predicate to a post-incident search whose results will be considered for use in a criminal prosecution, and/or (2) limiting use of test results to employment purposes such as suspension or discharge. See, *e.g.*, *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (upholding Customs Service drug-testing program in part because it mandated that "[t]est results may not be used in a criminal prosecution of the employee without the employee's consent"); Pet. 5-6 (detailing NYPD's own prior programs).

2. Respondents correctly note that the majority in *Ferguson*, unlike the court below, had found that law enforcement was the "primary" purpose of the suspicionless searches. Opp. 25. But they ignore the *Ferguson* majority's emphasis that its "essential point"—that "the extensive entanglement of law enforcement cannot be justified by reference to [special] needs"—was "the ***same*** as Justice Kennedy's" in his concurrence. 532 U.S. at 83 n.20 (emphasis added).

Justice Kennedy found the hospital drug-testing program unconstitutional notwithstanding his disagreement with the majority's holding that the "primary" purpose of the search was law enforcement. *Id.* at 86-89 (Kennedy, J., concurring). Justice Kennedy explained that "the search policy cannot be sustained" even though it "may well have served [special] needs" because "there was substantial law enforcement involvement in the policy from its inception." *Id.* at 88. So too here.

3. In any event, the court of appeals' decision conflicts not only with *Ferguson*'s prohibition against "extensive entanglement of law enforcement" but also with *Ferguson*'s holding that "primary purpose" must be assessed by reference to "immediate" rather than "ultimate" objectives. Respondents mischaracterize our challenge to the court of appeals' analysis of which of the City's purposes was "primary" as an "attempt to * * * discredit the unchallenged evidence" regarding the City's purposes in adopting IO-52. Opp. 27. But the petition did not challenge that evidence; rather, the disagreement is with the court of appeals' legal evaluation of that evidence, including most particularly its failure to apply *Ferguson*'s legal holding that ***immediate***, not ultimate, objective controls. See Pet. 18-21.

Applying that legal standard, the "primary purpose" of IO-52—that is, its "immediate objective" is law enforcement. Rather than address that point on the merits, respondents protest that analysis of the plain language of IO-52's statement of purpose (Pet. 19-20) as a means of discerning their policy's immediate objectives is a "sleight of hand" (Opp. 27-28). But the plain language of a policy is the first piece of "unchallenged" record evidence (Opp. 27) that courts

use to assess purpose. See, *e.g.*, *Ferguson*, 532 U.S. at 81-82 (turning first to the language of the drug-testing policy to assess its programmatic purpose). In any event, it is this ground of opposition that is a "red herring," as the petition showed that each of the purposes respondents proffered—not just those identified in IO-52's statement of purpose—is accomplished only through the more immediate objectives of criminal investigation and threatened prosecution. See Pet. 20-21.

On that score, respondents say nothing. Respondents do not appear to dispute that IO-52 achieves their stated purposes of deterring intoxicated police shootings and thereby protecting public safety (see Opp. 29-30) through the threat that any officers who test positive may be prosecuted. Indeed, they trumpet what they characterize as "the measure's deterrent effect." Opp. 28; accord Opp. 23, 30. But see *infra*, at 10. Respondents offer no distinction of the holding in *Ferguson* that where the threat of prosecution is used to achieve the ultimate civil objectives by deterring the targeted misconduct, the "immediate objective"—and hence the "primary purpose"—of the substance tests is "law enforcement." 532 U.S. at 83.

4. Moreover, even if the Court agrees with the court of appeals that the "primary purpose" of IO-52 is a legitimate civil objective, the case presents a key question arising in the wake of *Ferguson* precisely because the majority there did find a law-enforcement "primary purpose": whether significant—though not "primary"—law-enforcement purpose and entanglement precludes justification under the "special needs" exemption, as Justice Kennedy would have held, and the majority strongly sug-

gested but did not need to decide. See Pet. 21-22. Respondents endeavor to duck that critical question by simply labeling it, without response, explanation or citation, "unpreserved." Opp. 28. That is plainly wrong, for several reasons. First, it is well established that, "[o]nce a federal ***claim*** is properly presented, a party can make ***any argument*** in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added). It is indisputable that petitioners raised the claim that respondents' program of suspicionless searches violated the Fourth Amendment's prohibition against unreasonable searches. As in *Yee*, having raised the claim that the City's policy violated a particular clause of the Constitution, "petitioners could * * * formulate[] any argument they like[] in support of that claim here." *Id.* at 535; accord *Citizens United* v. *Fed. Election Comm'n*, 130 S. Ct. 876, 893 (2010).

As it happens, moreover, not only was the same ***claim*** indisputably raised below, so too was the virtually identical ***argument***. In the court of appeals, invoking *Ferguson*, petitioners repeatedly and emphatically argued that "excessive entanglement" of law enforcement and the possible use of positive test results in criminal prosecutions preclude application of the "special needs" doctrine to IO-52's program of suspicionless searches and renders the searches unconstitutional under the Fourth Amendment. See, *e.g.*, Brief for Appellants 28-38. Petitioners make that same argument, and present that same question, here. See Pet. *i*, 11, 15-17, 22. The only difference is that, having now received the court of appeals' decision that, notwithstanding that one purpose of IO-52 is "directly related to crime control," the special needs doctrine cannot apply because the

crime control purpose purportedly is not "primary" (Pet. App. 12a-13a), petitioners now add that the same argument obtains regardless which purpose might be deemed "primary."

Finally, even were these two grounds of preservation unavailable, the issue whether significant, but not primary, law-enforcement purpose and entanglement renders a program of suspicionless searches unconstitutional would still be preserved for this Court's review because that precise issue was decided by the court below. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). See Pet. App. 13a ("Here we must clarify one aspect of law surrounding the 'special needs' doctrine: * * * the mere fact that crime control is *one* purpose—but not the *primary* purpose—of a program of searches does not bar the application of the special needs doctrine.").

5. Respondents obliquely suggest that *Skinner* v. *Railway Labor Executives' Association*, 489 U.S. 602 (1989), decided the question here, contending that *Skinner*, in upholding a private employer's post-accident suspicionless testing, reserved only the question whether the administrative nature of a suspicionless search program could be impugned by a showing of "pretext" and held that, absent pretext, the program must be assumed to be intended for "'its obvious administrative purpose.'" Opp. 24-25 (quoting *Skinner*, 489 U.S. at 621 n.5). That is incorrect. The Court in *Skinner* explicitly "[left] for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext, ***or otherwise*** impugn the administrative nature of the * * * program." *Skinner*, 489 U.S. at

621 n.5 (emphasis added). That statement expressly reserved the question whether the "administrative nature" of a suspicionless search program might be "impugned" not just by a showing of "pretext," but "otherwise," such as by mixed motives or excessive entanglement of law enforcement—both of which are present here. Were that not so, the Court would have needed to renounce, rather than invoke, *Skinner* to decide *Ferguson*, which was itself a mixed motives case—with an immediate law-enforcement objective and an ultimate civil objective—in which there was no possible claim that the civil objective was "pretext."

Moreover, respondents ignore that the Court explained in *Skinner* that it "recognized exceptions to" the usual Fourth Amendment requirements only "when 'special' needs * * * make the warrant and probable-cause requirement ***impracticable***." 489 U.S. at 619 (emphasis added). In *Skinner*, what made the requirements impracticable was the fact that the searches were conducted not by law-enforcement officials like respondents, but by private "[r]ailroad supervisors" who "are not in the business of investigating violations of the criminal laws." *Id.* at 623. Obviously, respondents can make no such claim of "impracticability." The law-enforcement officials who respond to every shooting are specially trained to assess whether constitutionally sufficient grounds for suspecting intoxication exist and warrant a breath test. See Pet. 5-6. Cf. *McDuff* v. *Mississippi*, 763 So. 2d 850, 855 (Miss. 2000) (en banc).[1]

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[1] Because IO-52 requires ***neither*** reasonable suspicion ***nor*** probable cause, it is necessary to address in this case only whether some level of individualized suspicion, not which level,

Respondents resort to invoking *New York* v. *Burger*, 482 U.S. 691 (1987), in support of their proposition that the special needs doctrine can exempt suspicionless searches "where, as here, there may be an incidental law enforcement purpose." Opp. 27-28. But as the Court explained in *Ferguson*, "this case differs from *New York* v. *Burger*" in that *Burger* involved a search of "commercial premises," not a more intrusive bodily search. 532 U.S. at 83 n.21.

6. Respondents' effort to dispute that state supreme courts have divided over the scope of the "special needs" doctrine in cases squarely analogous to the one at bar, with the vast majority holding programs similar to IO-52 unconstitutional (Opp. 28-29), falls flat. Exactly like this case, these decisions addressed statutes that mandated suspicionless substance testing as part of police investigations into public safety incidents and the possibly criminal conduct of the tested individuals of causing the injury or death of another person due to intoxication. Most of the state courts addressing such statutes ruled them unconstitutional despite recognizing that they served multiple important civil purposes, including (exactly as IO-52 is claimed to do): deterring dangerous conduct while intoxicated and identifying and immediately removing people who have engaged in such conduct to prevent an imminent threat to public safety. See Pet. 23-27.

Respondents err in suggesting that these cases are "inapposite" because the drivers are not "employees who, like the officers here, have a diminished expectation of privacy." Opp. 28-29. The expectation

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is required as a predicate to the police investigators' post-incident breath-testing.

of privacy, or lack thereof, comes into play only in the balancing test of the individual's and government's interests that follows ***if*** the "special needs" doctrine applies. See, *e.g.*, *Von Raab*, 489 U.S. at 665-666 (assessing first whether the "drug-testing program [was] * * * designed to serve the ordinary needs of law enforcement" as a predicate to assessing the "balance of privacy and governmental interests"). The question at issue here, by contrast, is whether the special needs doctrine applies in the first instance.

Respondents attempt to distinguish the Ninth and Fifth Circuit decisions that applied *Ferguson* to hold unconstitutional searches that, like IO-52, are conducted for mixed law-enforcement and civil purposes absent individualized grounds for suspicion, arguing that those cases did not involve "exigent circumstances." Opp. 29. But no one disputes that the exigent circumstance of the possible rapid dissipation of evidence of intoxication may justify a search without a warrant. What that prospect does not justify is a search without ***any ground for suspicion***. Cf. *Schmerber* v. *California*, 384 U.S. 757 (1966).

7. Respondents boast that new, non-record evidence indicates that "as of August 8, 2010, there have been 133 breathalyzer tests pursuant to IO 52" (Opp. 26 n.4) and "not a single officer has been found to have been impaired" (Opp. 28). But it is no virtue that the people searched pursuant to a suspicionless search policy have been guilty of no wrongdoing. Respondents' suggestion that this evidence proves the testing's deterrent effect (*ibid.*) is misguided. To the contrary, the failure of the suspicionless testing to identify any intoxication by officers who have discharged their weapons merely confirms what the

dearth of evidence of such wrongdoing prior to adoption of the suspicionless testing program suggested: an absence of a "concrete danger" warranting the suspicionless testing in the first place. *Chandler* v. *Miller*, 520 U.S. 305, 318-319 (1997); see also Pet. 7, 32.

8. Respondents' unsupported declaration that the court of appeals' ruling is "fact-specific" and its reach therefore limited (Opp. 29) is simply wrong. The court of appeals ruled that the "special needs" doctrine allows police to conduct suspicionless, nonconsensual substance tests of employees whose conduct affects public safety, notwithstanding that the searches are intended to uncover evidence for use against the employees in possible criminal prosecutions, provided the searches are conducted "primarily" to deter employee intoxication in dangerous circumstances, identify and immediately remove intoxicated employees whose continued work may pose a threat to public safety, and/or uphold the safety reputation of the institution. Respondents do not and cannot identify a single reason why that holding would not apply equally to search policies affecting not only every law-enforcement and correction officer, but also every employee in every industry and governmental function, whose conduct can significantly affect public safety.

Indeed, the reach of the court of appeals' holding that the "special needs" doctrine can apply notwithstanding significant law-enforcement entanglement and purpose is even broader. That holding would enable ***every*** private or government entity, whose primary purposes for their existing drug-testing programs are civil, to add to those programs a new feature: mandatory reporting of all positive test results

to law-enforcement for criminal prosecution. See Pet. 30-32. All they need do, under the Second Circuit decision, is postulate that referral to law-enforcement will enhance deterrence, thereby better accomplishing their ultimate civil objectives.

9. Finally, respondents suggest that the Court decline to grant review because the case arises from preliminary injunction proceedings. Notably, however, they do not actually assert that the preliminary injunction record is in any way incomplete or inadequate to allow a final ruling on the constitutionality of the City's search program. See Opp. 19-22. Nor could they make such an assertion, given their own counsel's repeated concessions to the contrary before the court of appeals. Specifically, respondents conceded that the evidentiary record on the constitutionality of IO-52 is "certainly as complete as it's probably gonna get." Pet. 10 n.2; Pet. App. 49a. They likewise agreed that the court of appeals was "in a position on the basis of this record" to rule on the constitutionality of IO-52 and that there "absolutely" was "enough of an evidentiary record to support that legal determination." Pet. App. 47a.

Constrained by those concessions, respondents hinge their argument not on an assertion that the record actually is insufficient to support a final determination, but on their observation that petitioners, who likewise asserted before the court of appeals that the record appeared sufficient for a final determination (Pet. 10-11), once took a different position at an earlier stage of the litigation by opposing summary judgment. Opp. 19-20.

But that is irrelevant. The court of appeals has now rendered a decision. Notably, that decision on the constitutionality of IO-52 does not rest on any

basis peculiar to the preliminary injunction context, such as a balancing of equities or assessment of a "likelihood" (as opposed to a certainty) of success on the merits. Indeed, one of the court of appeals judges observed at the oral argument that were the court to do as it has now done—that is, affirm the denial of the preliminary injunction—petitioners' case would effectively, if not actually, be "over." Pet. App. 48a. Accordingly, as in *City of Indianapolis* v. *Edmond*, 531 U.S. 32 (2000), review by the Court at this time is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MICHAEL T. MURRAY
Michael T. Murray & Assocs., P.C.
10 Esquire Rd., Ste. 10
New City, NY 10956
(845) 634-0031

THOMAS P. PUCCIO
Law Offices of Thomas P. Puccio
230 Park Ave. Ste. 301
New York City, NY 10169
(212) 883-6383

ANDREW L. FREY
Counsel of Record
EILEEN PENNER
Mayer Brown LLP
1999 K St. NW
Washington, DC 20006
(202) 263-3291
afrey@mayerbrown.com

Counsel for Petitioners

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